IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 165.

HOMARD P. DORSEY,
Petitioner,

vs.

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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STATUTE AND RULE

Federal Rules of Criminal Procedure, Rule 52 4, 6
18 U.S.C., Section 371 4

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Homard P. Dorsey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on May 24, 1961.

OPINION BELOW.

The District Court did not render a written opinion. The decision and judgment of the Court of Appeals for the Sixth Circuit are annexed hereto as an appendix, on page A1.

JURISDICTION.

The judgment of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

(1) Is there substantial evidence to support the verdict of the jury and the judgment of the United States District Court based thereon?

(2) Was it error for the United States District Court to admit, over the objection of petitioner's counsel, the following testimony of federal officer J. N. Petre:

"Q. Go ahead and state what was said.

A. One of them stated that that 'G-d "Pot" and Harry wouldn't even get a watchman for us. They are funny people. They are all for themselves. I tried to get one of them to get Woodrow to watch for us at night, but they wouldn't.' He said, 'I don't want to go to the G-d pen over these stills.'

Q. Do you know anybody in that area named 'Pot'?

A. I do.

Q. Do you know more than one person?

A. No, I do not.

Q. Who is that?

A. Homard 'Pot' Dorsey.

Q. Is he in the courtroom?

A. Yes, sir.

Q. Do you know any person by the name of Woodrow?

A. Yes, sir, I do.

Q. Who is that?

A. Woodrow Denton.

Q. In relation to these stills, where is his home located?

A. Approximately 35 yards across the Cosby highway.

Mr. Ray H. Jenkins: May I ask which home he is talking about?

The Court: Yes, sir.

Which home?

The Witness: The Denton home, Woodrow Denton home.

By Mr. Ray L. Jenkins:

Q. You heard them say they wouldn't get Woodrow, that they tried to get Woodrow?

A. One of them stated he tried to get 'Pot' and Harry to get Woodrow to watch for them."

(3) Was it error for the United States District Court to admit, over the objection of petitioner's counsel, the following testimony of federal officer Pardini:

"Q. While they were unloading the truck, did you hear any conversation?

A. I did. One of them stated, in substance, that Harry and 'Pot' were too cheap to get a watchman for them and they didn't care to go to the penitentiary over those stills."

(4) Did the United States District Court err in charging the jury as follows:

"It sometimes happens in criminal prosecutions, where two or more persons have participated in the commission of crime, that one of those persons becomes a witness for the Government against the other participants. Testimony of such a witness is classified as that of an accomplice. The testimony of an accomplice is admissible and entitled to such weight as the jury feels it should have. In weighing the evidence of an accomplice, you should give due regard

to the fact that he might have been on trial as a defendant himself. You should weigh his testimony carefully and cautiously. You should not place too firm a reliance upon the testimony of an accomplice unless his testimony is corroborated by the testimony of witnesses who were not accomplices, or corroborated by facts and circumstances in evidence that indicate the truthfulness of the testimony of the accomplice. The verdict of guilty should not be based upon the testimony of an accomplice unless that testimony, in consideration of all the circumstances presented to the jury, leaves in the minds of the jurors no reasonable doubt of its truth."

STATUTE INVOLVED.

18 U.S.C., Section 371:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"

RULE INVOLVED.

Federal Rules of Criminal Procedure.

Rule 52. *Harmless Error and Plain Error.*

(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT.

Petitioner was convicted in the United States District Court for the Eastern District of Tennessee, Northeastern Division, on September 23, 1969, in a one count indictment charging a violation of 18 U.S.C., Section 371, in that petitioner allegedly conspired with others to violate Sections 5174, 5179, 5601(a)(1), 5606, 5173, 5601(a)(4), 5216, 5222, 5601(2)(7), 5008(b), 5642, 5205(a)(2), 5604(a)(1), 5686, 5681, 7201 and 7206 of the Internal Revenue Code of 1954. All of said Code sections pertain to the illicit manufacture and possession of distilled spirits on which the tax has not been paid, and to the distilling of such spirits and the possession of same without complying with the Internal Revenue Code.

Petitioner received the maximum sentence, to-wit: five years, and is now enlarged upon bail in the penal sum of $5,000.00.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred in holding:

(1) There was substantial evidence to support the verdict of the jury and the judgment of the District Court based thereon.

(2) It was not error for the District Court to admit, over the objection of petitioner's counsel, that portion of federal officer Petre's testimony, which is quoted under "Questions Presented", above, as (2).

(3) It was not error for the District Court to admit, over the objection of petitioner's counsel, the testimony of

federal officer Pardini as set forth under "Questions Presented", above, as (3).

(4) It was not reversible error, or prejudicial error, for the District Court to charge the jury as is set forth under "Questions Presented", above, as (4).

REASONS FOR GRANTING THE WRIT.

The questions here presented are substantial ones, and we feel are of wide-spread importance in that there is a conflict between the decision of the United States Court of Appeals for the Sixth Circuit in this case and other circuits as to what constitutes sufficient evidence to warrant a conviction in a conspiracy case. The questions presented here are substantial also in that if the decision of the Court of Appeals for the Sixth Circuit is permitted to stand in this case, we feel it amounts to a complete abrogation of Rule 52, Federal Rules of Criminal Procedure, in that the Court of Appeals recognized in this case that the matters complained of with respect to the introduction of evidence and the charge to the jury were erroneous, but denied that the errors were "plain error" such as may be noticed by the Court of Appeals although not brought to the attention of the trial court. As will be shown hereinafter, the errors had the effect of denying petitioner a fair trial; and as will be shown, the errors were certainly grievous ones and could not have had any other effect than to prejudice the petitioner in the eyes of the jury. We think the jury undoubtedly based its verdict on the matters complained of herein as error, but which the Court of Appeals for the Sixth Circuit said was not "plain error". Petitioner's counsel in the Court of Appeals and here was not trial counsel.

Specification of Error No. (1). The sum and substance of the government's proof in this case is that whiskey violators parked their vehicles in front of petitioner's grocery store and garage on numerous occasions; that petitioner as a mechanic did repair work on vehicles which had been, and were later used to haul supplies to illicit distilleries and whiskey therefrom; petitioner on one occasion sold from his grocery store 24 bottles of isopropyl alcohol to an alleged conspirator; petitioner as a mechanic welded in his garage a broken place on an oil burner; an illicit distillery was found on petitioner's land which is located in a remote mountainous area covered with timber and underbrush; petitioner purchased for resale from his grocery store sugar, yeast, fruit jars and isopropyl alcohol; petitioner purchased 250 feet of electric wiring, a water pump, 100 feet of garden hose, and 120 cinder blocks.

What the conviction in this case amounts to is that the government convicted petitioner by use of the method known as "guilt by association" with others who were guilty.

The government relied upon knowledge, acquiescence, and indifference to violations by others to support conviction of petitioner. This Court has approved a decision stating that such is insufficient to support a conviction. *Egan v. U. S.*, 137 F.2d 369, cert. denied 320 U.S. 788.

In this case, the government relied for conviction upon the assertion that petitioner sold from his grocery, sugar, isopropyl alcohol, yeast, and fruit jars to persons whom he knew might use them in the manufacture of illicit distilled spirits. Mere knowledge that material or merchandise sold by one to another would be used for unlawful purposes is not sufficient to charge the seller as a co-conspirator. *U. S. v. Gerke*, 125 F.2d 243, cert. denied 316 U.S. 667; *Bacon v. U. S.*, 127 F.2d 985.

The government also relied for conviction of petitioner upon the insistence that he knew of the illegal activities of others and, still associated with them. This has been held to be insufficient to convict on a conspiracy charge. *Turcott* v. *U. S.*, 21 F.2d 829; *Burkhardt* v. *U. S.*, 13 F.2d 841; *Lucadamo* v. *U. S.*, 280 Fed. 653; *Marrash* v. *U. S.*, 168 Fed. 225; *U. S.* v. *Lancaster*, 44 Fed. 896.

The government also relied for conviction on the fact that there were casual associations by petitioner with known conspirators. This has been held insufficient to convict. *U. S.* v. *Moloney*, 200 F.2d 344.

The government relied for conviction upon the fact that petitioner rented a tenant house to one of the known conspirators. This has been held insufficient to convict. *Moss* v. *U. S.*, 132 F.2d 875.

The government made much of the fact that numerous vehicles which were seen at distilleries, being driven by others than petitioner, were later seen parked at petitioner's garage and store. This has been held insufficient to convict. See *Bauer* v. *U. S.*, 299 Fed. 10.

Cosby, Tennessee, is located in a remote area of the Great Smoky Mountains. In such communities, this Court must judicially know it is customary for those of the community to congregate around the "country store" such as the one owned by petitioner. Yet, the government relied upon such congregation as constituting overwhelming evidence that petitioner was engaged in the conspiracy.

The evidence showed that petitioner is a substantial businessman in his community. He is engaged in the raising of broiler chickens, producing some 26,000 broilers every nine weeks. Petitioner owns a garage where he does mechanic work. He served honorably in the United States

Army as a mechanic. He runs a "country store", and he also raises tobacco.

There was no substantial evidence in this case to support a conviction of petitioner.

Specification of Error No. (2). The admission of the evidence assigned by this Specification of Error was highly prejudicial and the testimony was rank hearsay, and its admission erroneous.

First, the statement, if admissible otherwise, was not made pursuant to a conspiracy, but was a mere recital of disappointment and could under no stress of the imagination be construed as having been a statement made pursuant to a conspiracy, or in furtherance of a conspiracy. See *U. S. v. Carminati*, 247 F.2d 640, cert. denied 355 U.S. 883; *U. S. v. Goldsmith*, 91 F.2d 983, cert. denied 302 U.S. 718; *Taylor v. U. S.*, 269 F.2d 737; *Panci v. U. S.*, 256 F.2d 308; *U. S. v. Konorsky*, 202 F.2d 721; *U. S. v. Dennis*, 183 F.2d 201.

There was an objection made by petitioner's counsel to the admission of this testimony and the District Court permitted its introduction over this objection, with a charge to the jury as appears at A3, attached hereto. This charge we submit was erroneous in view of the fact that the statement could not have been one admissible as being pursuant to the conspiracy, or in furtherance thereof. The charge of the District Court with respect to the admission of the testimony (see A3, hereof) is a correct statement of the law, but was wholly inapplicable in view of the circumstances under which the statement was made and the verbiage contained therein. It was further error to admit this testimony in that petitioner was not identified in the statement admitted by the District Court. The

only identification contained in the statement was "* * * that G-d 'Pot' * * *", and no last name was mentioned.

Specification of Error No. (3). This Specification of Error pertains to the admission of evidence concerning the same conversation about which officer Petre testified, and covered in Specification of Error No. (2), above. At this time, however, the evidence was again admitted by federal officer Pardini and had the effect of duplicating the erroneous admission of the testimony by officer Petre. This was not only an additional error, but accentuated the error of the District Court in admitting the testimony of officer Petre.

The same law applies to this Specification of Error as that cited under Specification of Error No. (2), above.

Specification of Error No. (4). There was no accomplice's testimony in the case. However, the District Court charged the law with respect to the testimony of an accomplice. As was pointed out during oral argument of the case in the Court of Appeals for the Sixth Circuit, by one of the Judges thereof, the giving of this erroneous charge concerning testimony of an accomplice no doubt was considered by the jury as applying to the statements of alleged conspirators, which the officers say they heard made at a distillery site, which error is assigned in Specifications of Error Nos. (2) and (3), above.

If the jury considered this charge with respect to an accomplice at all, since there was no accomplice testimony, the charge would have to apply to the statements made by alleged conspirators as set forth in Specifications of Error Nos. (2) and (3), above, and thus the charge with respect to an accomplice compounded the errors of the District Court as set forth in Specifications Nos. (2) and (3), above.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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